IN THE COURT OF APPEALS OF IOWA

No. 0-288 / 09-1413
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEWIS DOUGLAS MICHALOFF,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price, District Associate Judge.

Defendant appeals his conviction for operating while intoxicated, first offense. **REVERSED AND REMANDED.**

Matthew T. Lindholm of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.

I. Background Facts & Proceedings

On March 24, 2009, Lewis Michaloff was involved in a motor vehicle accident. He suffered several lacerations on his face and head, bruising, and he lost control of his bowels. At the hospital, deputy Doug Glenn of the Polk County Sheriff's Department noticed Michaloff smelled of an alcoholic beverage and had slurred speech.

Deputy Glenn read the Implied Consent Advisory to Michaloff. Deputy Glenn testified it would have been very difficult, if not impossible, to obtain a breath or urine sample from Michaloff due to his injuries, so he requested a blood test. Michaloff signed the consent form. A blood sample was taken, which showed he had a blood alcohol level of .170.

Michaloff was charged with operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2009). He filed a motion to suppress, claiming his consent to chemical testing was not voluntary because he had been misled as to whether he could refuse the blood test and he was denied due process. The court found no due process violation and denied the motion to suppress.

The case proceeded to a trial to the court on the minutes of testimony. The court found Michaloff guilty of operating while intoxicated. He was sentenced to one year in jail, with all but three days suspended. He was placed on probation for one year, ordered to pay a fine, and ordered to complete a

substance abuse evaluation. Michaloff appeals the denial of his motion to suppress.

II. Standard of Review

We review a claim that a person did not voluntarily consent to chemical testing de novo. *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994). Also, on constitutional issues our review is de novo. *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances, as shown by the entire record. *Id.*

III. Voluntary Consent

Michaloff contends he did not voluntarily consent to the blood test because he was given misleading information about his right to refuse. He points out that in the implied consent advisory he was informed that if he refused chemical testing his driver's license would be revoked. *See* Iowa Code § 321J.9. He also points to section 321J.6(2), which provides:

> The peace officers shall determine which of the three substances, breath, blood, or urine, shall be tested. Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit, and section 321J.9 applies. A refusal to submit to a chemical test of blood is not deemed a refusal to submit, but in that case, the peace officer shall then determine which of the other two substances shall be tested and shall offer the test.

Michaloff asserts that he should have been informed that his refusal of a blood test would not have been deemed a refusal of chemical testing.

The Iowa implied consent law "is based on the premise 'that a driver impliedly agrees to submit to a test in return for the privilege of using the public highways.'" *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981) (citation omitted).

While under the implied consent law a person impliedly agrees to submit to chemical testing, a person still has the right to refuse testing. *State v. Garcia*, 756 N.W.2d 216, 220 (Iowa 2008). For a person's consent to chemical testing to be valid, it must be voluntary and uncoerced. *Gravenish*, 511 N.W.2d at 381.

The issue in the present case was also addressed by the Iowa Supreme Court in *State v. Bernhard*, 657 N.W.2d 469, 470 (Iowa 2003), where the defendant "contend[ed] that a chemical test of his blood-alcohol level should have been suppressed because his consent to the withdrawal of his blood was obtained by an unwarranted threat of license revocation." Like the case under submission, Stanley Bernhard had been in an automobile accident and an officer requested a blood test while he was in the hospital receiving treatment for his injuries. *Bernhard*, 657 N.W.2d at 470-71.

The supreme court ruled:

> Although we recognize that the general admonition concerning license revocation that was read to defendant was misleading when given with respect to a request for blood, it was correct within the context of the complete statutory procedure that defendant was facing. At the time this admonition was given, the statutory procedure had not yet run its course.
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> Trooper Rude elected to first request a sample of blood. Because defendant consented to that request the inquiry went no further. If, however, defendant had refused to provide a sample of blood the implied consent procedure would have merely shifted to a request for a urine or breath sample. Defendant would have been required to provide a sample of one of those substances or face the revocation of his license. Defendant conceded at the suppression hearing that he was motivated to agree to a blood test because of the desire not to lose his license. . . . Consequently, the only real detriment that may have befallen defendant was unwittingly consenting to a blood test when he may have preferred one of the alternate tests.

Id. at 472. The court concluded Bernhard's consent to the blood test was voluntary and the motion to suppress had properly been denied. *Id.* at 472-73.

Michaloff seeks to distinguish *Bernhard* by arguing that deputy Glenn observed and later testified it would have been very difficult, if not impossible, to obtain a breath or urine sample from him due to his injuries. He asserts that a blood test was the only possible chemical test under the circumstances, and therefore, unlike *Bernard*, the statutory procedure had run its course at the time the implied consent advisory was given. He claims there would have been no negative consequences to him for refusing a blood test because refusal would *not* have been deemed a refusal for purposes of license revocation under section 321J.9, and no other tests would have been possible. He believes the provisions of section 321J.9 for refusal to submit to testing are not applicable to him. We agree.

The bottom line in the instant case is that Michaloff consented to a blood test based on misleading information. Deputy Glenn decided to seek consent to a blood test *after* deciding it would have been "very difficult, if not impossible" to obtain a breath or urine sample from Michaloff due to his injuries. In addition, the record is devoid of any evidence that Michaloff consented to testing to avoid any license revocation implications. We conclude that the statutory procedure had run its course and that this case can be distinguished from *Bernard.* The implied consent advisory was misleading when requesting the blood test from Michaloff. It would be pure speculation to suggest, based upon this record, that the implied consent procedure would have "merely shifted" to a request for breath or urine.

See Bernard, 657 N.W.2d at 472. Therefore, it is not possible upon this record to conclude, as was done in *Bernard*, that the only real detriment "that may have fallen defendant was unwittingly consenting to a blood test when he may have preferred one of the alternate tests." *See id.* This court cannot be confident that Michaloff's decision was not affected by the false threat. *See State v. Massengale*, 745 N.W.2d 499, 503 (Iowa 2008) (noting implied consent advisory was misleading with respect to defendant); *State v. Kjos*, 524 N.W.2d 195, 197 (Iowa 1994) (finding consent was not voluntary when it was obtained by a false threat of license revocation).

We therefore conclude the consent to the withdrawal of blood in the instant case was coerced under a false threat of license revocation. The motion to suppress should have been granted. We reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.